Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

MATTHEW D. SOLIDAY
Valparaiso, Indiana

ATTORNEYS FOR APPELLEE:

STEPHEN R. CARTER
Attorney General of Indiana
Indianapolis, Indiana

MATTHEW D. FISHER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER BLUHM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A05-0512-CR-744
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Mary R. Harper, Judge
Cause No. 64D05-0406-FA-5434

APRIL 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Christopher Bluhm appeals his conviction of neglect of a dependent, a Class B felony. We affirm.

Bluhm raises four issues for our review, which we restate as:

I. Whether the trial court abused its discretion in denying Bluhm's motion to suppress.

II. Whether the trial court abused its discretion in refusing to submit a proffered jury question to a witness.

III. Whether the trial court abused its discretion in refusing to give a tendered preliminary jury instruction.

IV. Whether the trial court abused its discretion in enhancing Bluhm's sentence.

On the morning of June 16, 2004, R.K., the young son of Bluhm's girlfriend SuAnn, observed that Bluhm and SuAnn's infant son Samuel was not breathing. Samuel's face was in a pillow on the couch, and he appeared to have suffocated. R.K. awakened Bluhm and Bluhm called 911. Paramedics arrived shortly thereafter and determined that Samuel had died.

Detectives called to the scene questioned Bluhm about Samuel's death. Bluhm told the detectives that Samuel had been alive shortly before the 911 call; however, at least one of the detectives believed that death had occurred earlier. Because there were inconsistencies in Bluhm's statements, the detectives asked R.K., SuAnn (Samuel's mother), and Bluhm to come to the police station to be interviewed. Bluhm followed the detectives to the police station in his own vehicle.

Between 12:05 p.m. and 2:35 p.m., Portage Police Department detectives conducted three short interviews with Bluhm in which they asked him about statements

inconsistent with statements SuAnn made in her interview. No advisement of *Miranda* rights was given before or during these interviews. After the conclusion of the third interview, and at approximately 2:35 p.m., Bluhm was advised of his rights and was given a voice stress test.

In a subsequent recorded interview with Detective David Adkins of the Chesterton Police Department and Detective Keith Burden of the Portage Police Department, Bluhm made incriminating statements. At trial, Adkins testified that Bluhm told the detectives that his intention when he laid Samuel face down on the couch was "[t]hat the baby would pass—would pass away." (Tr. at 282). Adkins further testified that Bluhm indicated he "could not afford having another child."[1] *Id.* Adkins also testified that Bluhm stated that he laid Samuel face down on the couch because "he wanted to send the baby to a better place" and because "he didn't want the baby alive." (Tr. at 281). Burden testified that in the interview Bluhm "admitted that he had placed the baby facedown into the pillow intentionally. . . that by placing it face down in the pillow he was hoping to send it to a better place." (Tr. at 290-91).

Bluhm was placed under arrest and was later charged with neglect of a dependent, a Class B felony. Bluhm filed a motion to suppress his recorded statement, and after a suppression hearing the motion was denied. At trial, Bluhm objected to the admission of the taped statement, which the court overruled. After the jury found Bluhm guilty of the

[1] In addition to Samuel and SuAnn's two children, Bluhm had three children from past relationships.

charged offense, the trial court sentenced him to a fourteen-year prison term with four years suspended to probation.

I.

Bluhm contends that the trial court abused its discretion in admitting the statements he made in the interview conducted by Detectives Adkins and Burden. Specifically, Bluhm argues that his statement was "the result of an illegal two-part questioning technique used by Portage law enforcement." Appellant's Brief at 8. In support of his contention, Bluhm cites *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).

In *Seibert*, the defendant's son, who had cerebral palsy, died in his sleep. 124 S.Ct. at 2605. Thinking that she would be charged with neglect because her son's body had bedsores, the defendant schemed with others to conceal the facts surrounding her son's death by incinerating his body in the course of burning the family's mobile home. *Id*. The defendant decided that a mentally ill teenager living with the family would be left in the mobile home to die in order to avoid the appearance that the defendant's son had been unattended. *Id.*

The defendant was subsequently arrested and taken to the police station for questioning. At the police station, the officer questioned the defendant, without giving her *Miranda* warnings, and she made incriminating statements. *Id.* at 2605-06. After a twenty-minute break, the defendant was given *Miranda* warnings, a waiver was signed, and a tape recording of her incriminating statements was made. *Id.* at 2606.

After the defendant was charged with first-degree murder, she sought to exclude both her pre-*Miranda* and her post-*Miranda* statements. *Id.* The trial court suppressed the first statement but admitted the taped, post-*Miranda* statements, and the defendant was subsequently convicted of second-degree murder. *Id.* at 2607.

The defendant's appeals eventually reached the United States Supreme Court, which began its analysis by emphasizing that "[t]he object of question-first [or two-part questioning] is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect had already confessed." *Id*. at 2610. Thus, the Court stated, "[t]he threshold issue when interrogators question first and warn later is . . . whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Id.* The Court then concluded that "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Id.* at 2611 (quoting *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)).

The Court listed a series of relevant facts that bear on whether *Miranda* warnings delivered midstream can be effective. These facts are: (1) the completeness and detail of the questions and answers in the first round of interrogation; (2) the overlapping content of the two statements; (3) the timing and setting of the first and second statements; (4) the continuity of police personnel; and (5) the degree to which the interrogator's questions treated the second round as continuous with the first. *Id.* at 2612.

This court has addressed the fact-sensitive application of *Seibert*. In *King v. State*, 844 N.E.2d 92 (Ind. Ct. App. 2005) and *Drummond v. State*, 831 N.E.2d 781 (Ind. Ct. App. 2005), we noted that *Seibert* required the suppression of post-*Miranda* statements where the defendant was in custody and police officers used the two-part interrogation to obtain both pre- and post- *Miranda* incriminating statements. We emphasized in both cases that the police exhibited a deliberate plan to "get the defendant to make 'some admissions—maybe even a confession as to what he did.'" *King*, 844 N.E.2d at 98 (quoting *Drummond*, 831 N.E.2d at 784).

In *Johnson v. State*, 829 N.E.2d 44, 51 (Ind. Ct. App. 2005), *trans. denied*, we noted that *Seibert* is distinguished from the prior case of *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), in that *Elstad* involved a "good faith" *Miranda* mistake as part of a two-part interrogation, while *Seibert* involved "a police strategy adapted to undermine the *Miranda* warnings." We concluded that the use of a two-part interrogation in questioning Johnson did not require suppression because "the failure to obtain a valid waiver with regard to the first statement involved a good-faith *Miranda* mistake open to correction by careful warnings, and therefore, did not render the second statement inadmissible." *Id.*

In *Maxwell v. State*, 839 N.E.2d 1285, 1288 (Ind. Ct. App. 2005), *trans. denied*, we noted that *Seibert* did not require suppression of a post-*Miranda* statement where the defendant made no incriminating statements during a pre-*Miranda* encounter with the police. We emphasized that even though there was some conversation between the police

and the defendant before the reading and waiver of his *Miranda* rights, no actual questioning took place. *Id*. at 1289.

After considering the factors listed in *Seibert*, and after considering our prior cases interpreting *Seibert*, we conclude that the trial court's denial of Bluhm's motion to suppress and its overruling of his objection to the admission of the taped, post-*Miranda* statement were warranted. First, we note that the pre-*Miranda* interview questions were asked in order to assist the police in understanding and evaluating the discrepancies among the accounts given by Bluhm, R.K., and SuAnn. Bluhm was not a suspect at the time, and he did not appear to be in custody. He voluntarily drove to the interviews, and he was not told that he was under arrest or given any indication that he could not leave. Second, and most importantly, there is no material overlapping content of Bluhm's pre-*Miranda* answers and his post-*Miranda* incriminating statements. It is significant that he made no incriminating statements prior to being advised of and waiving his *Miranda* rights. Thus, we believe the facts of the present case are distinguishable from those that required suppression under *Seibert*.

Furthermore, we note that Bluhm failed to object to Adkins' and Burden's retelling of Bluhm's post-*Miranda* incriminating statements. Thus, even if the trial court had erred in ruling against Bluhm on his pre-trial motion and his trial objection, the error would have been harmless. *See Johnson*, 829 N.E.2d at 51.

II.

As part of Bluhm's case, a forensic pathologist testified, among other things, that the location of certain white spots on Samuel's forehead were an indication that his face

was not directly in the pillow. One of the jurors submitted a question to the trial court after the pathologist completed his testimony. The juror desired the pathologist to answer whether it is "possible for the white spots on the baby's [Samuel's] face to be caused by the defendant [Bluhm] pressing on those spots during CPR?" (Tr. at 398). After hearing argument from counsel, the trial court decided not to submit the question to the pathologist. In making its ruling, the trial court stated, "I think that it would be speculation as to whether or not the pressure did occur as we've been through those witnesses, and there is no—nothing in the testimony thus far to indicate that that occurred during the CPR or that type of thing. Certainly not consistent with the 911 instructions [given to Bluhm] of CPR." (Tr. at 400).

Bluhm argues that the trial court abused its discretion in not asking the question. He emphasizes that after hearing Bluhm's testimony that he had attempted to revive Samuel by using CPR and the pathologist's testimony that pressure on the body of the deceased within the first six to eight hours after death will leave white marks, it was understandable that the juror would want to ask about the possibility of CPR, rather than lividity, causing the white spots.

Indiana Evidence Rule 614(d) governs juror questions and provides in relevant part that a juror may be permitted to "propound questions to a witness" by submitting the questions to the trial court. The trial court then decides whether to submit the questions to the witness, "subject to the objections of the parties." Once the trial court "has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness." *Id*.

Evid.R. 614(d) "makes evident by its language that not all juror questions are proper and that a trial judge must determine whether the question is appropriate after hearing objections from the parties. However, the rule does not otherwise state what an appropriate question is." *Trotter v. State*, 733 N.E.2d 527, 531 (Ind. Ct. App. 2000), *trans. denied*. Our court has held, however, that a proper question is one that "allows the jury to understand the facts and discover the truth." *Id.* (citing *Matheis v. Farm Feed Construction Co.*, 553 N.E.2d 1241, 1242-43 (Ind. Ct. App. 1990)). Our supreme court has noted that jurors, by asking questions, may obtain an understanding of the issues and the evidence, learn the facts, and discover the truth. *Carter v. State*, 250 Ind. 13, 234 N.E.2d 650, 651-52 (1968). The trial court is afforded broad discretion in determining whether to submit a juror's question to the witness. *Trotter*, *id.* (citing *Dowdy v. State*, 672 N.E.2d 948, 953 (Ind. Ct. App. 1996)).

Prior to the pathologist's testimony, Bluhm testified that he performed CPR upon Samuel, a process by which he "gave [Samuel] breaths." (Tr. at 334; 358). Accordingly, there is some testimony that could be interpreted to indicate touching of Samuel's face. However, it appears that the trial court did not draw the conclusion from the testimony that the touching included Samuel's forehead, and in its discretion determined not to submit the question to the pathologist.

Even if the trial court abused its discretion in not submitting the question to the witness, such error is harmless under the facts of this case. Although a positive answer to the question may have been favorable to Bluhm's case, other evidence negates its impact upon the jury. R.K. testified that he found Samuel face down on the pillow, and the

testimony of the State's pathologist established that that fact because "blood settled in the face area." (Tr. at 256). Most damaging, of course, was Bluhm's admission to police that he placed Samuel face down upon the pillow with the intent of ending Samuel's life.

III.

Bluhm tendered a proposed preliminary instruction that defined the medical phenomenon called "Sudden Infant Death Syndrome" (SIDS). Specifically, the proposed instruction stated, "The definition of Sudden Infant Death Syndrome (SIDS) is "the sudden death of an infant under one year of age which remains unexplained after a thorough case investigation, including performance of a complete autopsy, examination of the death scene, and review of the clinical history." (Appellant's App. at 31).

The trial court refused to give the preliminary instruction, and Bluhm argues that the trial court abused its discretion in doing so. Bluhm reasons that to insure a fair trial, "the jury should have been able to look at SIDS as the defense theory of the case and compare and contrast it to the State's theory of neglect throughout the trial." Appellant's Brief at 24.

Indiana Rule of Criminal Procedure 8 governs the trial court's approval or rejection of proposed preliminary instructions. The rule requires the trial court to "instruct in writing as to the issues at trial, the burden of proof, the credibility of witnesses, and the manner of weighing the testimony to be received." Rule 8(F). It does not require the trial court to instruct the jury regarding a party's theory of the case.

Furthermore, the trial court's decision not to give the proposed preliminary instruction did not deny Bluhm a fair trial. The transcript discloses that SIDS was both

defined at trial and set forth as Bluhm's defense theory. The State's pathologist testified that he had arrived at a ruling of SIDS because there was no way to tell from the autopsy "whether Sam[uel] died of slow suffocation or SIDS." (Tr. 262-72). In addition, the defense pathologist also testified that she believed that Samuel's death was SIDS related. Finally, the definition of SIDS was given in the final instruction, and any confusion caused by the omission of the preliminary instruction was thus rectified. *See Everly v. State*, 271 Ind. 687, 395 N.E.2d 254, 257 (1979).

IV.

At the conclusion of the sentencing hearing, the trial court ordered Bluhm to serve a fourteen-year sentence (with four years suspended). In ordering the sentence, the trial court listed the following aggravating circumstances: (1) the victim was less than twelve years of age; (2) the victim was mentally or physically infirm; (3) Bluhm was in a position of trust with the victim; and (4) the offense was committed in the presence of or within the hearing of R.K., who was less than eighteen-years old at the time. The trial court listed the following mitigators: (1) Bluhm has a minimal history of criminal activity; and (2) Bluhm expressed remorse for his actions. Bluhm contends that he should not have received an enhanced sentence because the first two aggravating factors are inappropriate.

Sentencing decisions are left to the sound discretion of the trial court. *Edwards v. State*, 842 N.E.2d 849, 854 (Ind. Ct. App. 2006). When the trial court imposes a sentence other than the presumptive sentence, we will examine the record to insure that the trial court explained its reasons for selecting the sentence it imposed. *Id*. The trial court's

statement of reasons must include (1) identification of all significant aggravators and mitigators; (2) the specific facts and reasons that led the court to find the existence of those aggravators and mitigators; and (3) an articulation demonstrating that the aggravators and mitigators were balanced in determining the sentence. *Id*. A single aggravator may be sufficient to sustain an enhanced sentence. *Id. at 855.*

The neglect of a dependent statute provides that a person having care of a dependent commits the offense when he knowingly or intentionally places the dependent in a situation that endangers the dependent's life. Ind. Code § 35-46-1-4. The offense is a Class B felony when it results in serious bodily injury. *Id.* In addition, Ind. Code § 35-46-1-1 defines a "dependent" as "an unemancipated person who is under eighteen years of age."

As Bluhm alleges, the general rule is that the age of the victim may not be used as an aggravating circumstance because age is an element of the offense. *See Edwards*, 842 N.E.2d at 854. However, a trial court may consider the particularized factual circumstances of the case to be an aggravating factor, and Ind. Code § 35-38-1-7.1(a)(3) states that whether the victim was less than twelve years old is a mandatory consideration. *Id*. We have held that a trial court may consider the victim's age as a particularized factual circumstance and use the factual circumstance as an aggravator when the victim was of particularly tender years. *Id*. at 855; *Buchanan v. State*, 767 N.E.2d 967, 971 (Ind. 2002); *Kile v. State*, 729 N.E.2d 211, 214 (Ind. Ct. App. 2000)).

In the present case, the trial court recognized that the age of the victim is an element of the offense. However, it also noted that the victim "was so very young" that

age should be counted as an aggravator. Sentencing Transcript at 27. This is a statement of the particularized factual circumstances of Bluhm's neglect and is sufficient to support the trial court's use of age as an aggravating circumstance.

The trial court lists as the second aggravator in its sentencing order that the victim was physically and mentally infirm; however, there is no discussion of the aggravator's parameters. We believe that it merges into the first aggravator.

We note that the trial court stated that the last aggravator—the commission of the offense in the presence of R.K.—was the "primary aggravating factor in this case and the one [that] does certainly merit imposition of an aggravated sentence. . . ." Sentencing Transcript at 27. The trial court noted the "life changing" circumstances and "significant impact" that Bluhm's neglect had on young R.K. *Id*.

In sum, the trial court did not abuse its discretion in finding three valid aggravators that supported enhancement of Bluhm's sentence.

Affirmed.

NAJAM, J., concurs.

SULLIVAN, J., dissenting with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER BLUHM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A05-0512-CR-744
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

SULLIVAN, Judge, dissenting

Although I concur as to Parts III and IV of the majority decision, I respectfully dissent as to Parts I and II.

I would reverse and remand for a new trial.